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April 26, 2000

REDACTED – FOR PUBLIC INSPECTION

**BY COURIER**

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W. -- Room TWB-204  
Washington, D.C. 20554

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Re: CC Docket 00-65, Application by SBC Communications, Inc., et al. for  
Provision of In-Region, InterLATA Services in Texas

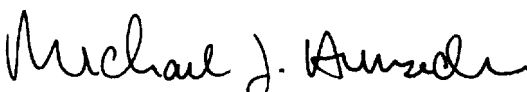
Dear Ms. Salas:

Pursuant to the Public Notice issued on April 6, 2000, please find enclosed the Supplemental Comments of AT&T Corp In Opposition to SBC's Section 271 Application for Texas. AT&T is submitting an original and two copies of its Comments and supporting exhibits in redacted form.

AT&T is also submitting under seal the portions of supporting exhibits that contain material designated as confidential pursuant to the Protective Order in this matter and in CC Docket 00-4. These pages bear a legend indicating that they are confidential.

Finally, also enclosed is a CD-ROM that contains the portions of AT&T's redacted submission that exist in electronic form. If there are any questions concerning AT&T's submission in this matter, including matters relating to AT&T's confidential submission, please do not hesitate to contact me. Thank you for your attention to this matter.

Sincerely,

  
Michael J. Hunseder

Enclosures

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Application of SBC Communications Inc.,  
Southwestern Bell Telephone Company,  
And Southwestern Bell Communications  
Services, Inc. d/b/a Southwestern Bell Long  
Distance for Provision of In-Region  
InterLATA Services in Texas

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CC Docket No. 00-65

**SUPPLEMENTAL COMMENTS OF AT&T CORP. IN OPPOSITION TO  
SBC'S SECTION 271 APPLICATION FOR TEXAS**

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April 26, 2000

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**FCC ORDERS CITED**

| <b>SHORT CITE</b>                      | <b>FULL CITE</b>  |
|--|---|
| <u>Ameritech Michigan Order</u>        | Memorandum Opinion and Order, <u>Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan</u> , 12 FCC Rcd. 20543 (1997).   |
| <u>BA-NY Order</u>                     | Memorandum Opinion and Order, <u>Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York</u> , CC Dkt. No. 99-295, 1999 WL 1243135 (rel. Dec. 22, 1999).   |
| <u>BellSouth South Carolina Order</u>  | Memorandum Opinion and Order, <u>Application of BellSouth Corp., et al. Pursuant to Section 271 to Provide In-Region, InterLATA Services in South Carolina</u> , 13 FCC Rcd. 539 (1997).  |
| <u>Line Sharing Order</u>              | Third Report and Order, <u>Deployment of Wireline Service Offering Advanced Telecommunications Capability</u> , CC Dkt. No. 98-147 and Fourth Report and Order, <u>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</u> , CC Dkt. No. 96-98, 14 FCC Rcd. 20912 (rel. Dec. 9, 1999).                                 |
| <u>Local Competition Order</u>         | First Report and Order, <u>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</u> , 11 FCC Rcd. 15499 (1996), <u>aff'd in part and vacated in part by Iowa Utils. Bd. v. FCC</u> , 120 F.3d 753 (8th Cir. 1997), <u>aff'd in part and rev'd in part by AT&amp;T Corp. v. Iowa Utils. Bd.</u> , 119 S. Ct. 721 (1999). |
| <u>Non-Accounting Safeguards Order</u> | First Report and Order and Further Notice of Proposed Rulemaking, <u>Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended</u> , 11 FCC Rcd. 21905 (1996).  |
| <u>Qwest Order</u>                     | <u>AT&amp;T Corp., et al. v. Ameritech Corp., et al.</u> , 13 FCC Rcd 21438 (1998), <u>aff'd sub nom. U S WEST Comm., Inc. v. FCC</u> , 177 F.3d 1057 (D.C. Cir. 1999), <u>cert. denied</u> , 120 S.Ct. 1240 (2000).  |

| SHORT CITE                              | FULL CITE  |
|---|--|
| <u>SBC/Ameritech Merger Order</u>       | Memorandum Opinion and Order, <u>Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations</u> , CC Dkt. No. 98-141, 14 FCC Rcd. 14712 809551 (rel. Oct. 8, 1999), <u>app. pend. sub. nom. Telecommunications Resellers Ass'n v. FCC</u> , Case No. 99-1441 (D.C. Cir.). |
| <u>Second BellSouth Louisiana Order</u> | Memorandum Opinion and Order, <u>Application of BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana</u> , 13 FCC Rcd. 20599 (1998).  |
| <u>Second Computer Inquiry</u>          | Final Decision, <u>Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)</u> , 77 F.C.C.2d 384 (1980).   |
| <u>Supplemental UNE Remand Order</u>    | Supplemental Order, <u>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</u> , CC Dkt. No. 96-98, 15 FCC Rcd. 1760 (rel. Nov. 24, 1999).  |
| <u>UNE Remand Order</u>                 | Third Report and Order, <u>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</u> , CC Dkt. No. 96-98, 1999 WL 1008985 (rel. Nov. 5, 1999).  |

#### MISCELLANEOUS PLEADINGS CITED

|                            |  |
|----------------------------|--|
| AT&T 3/6 Hot Cut Ex Parte  | Ex Parte Letter from David F. Wertheimer and John A. Redmon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket 00-4 (March 6, 2000).  |
| AT&T 3/13 Hot Cut Ex Parte | Ex Parte Letter from David F. Wertheimer and John A. Redmon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket 00-4 (March 13, 2000). |
| AT&T 3/29 Ex Parte         | Ex Parte Letter from David F. Wertheimer and John A. Redmon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket 00-4 (March 29, 2000)  |

AT&T Supplemental Comments - SBC- Texas

|                         |  |
|-------------------------|--|
| AT&T Pricing Ex Parte   | Letter from Mark C. Rosenblum, AT&T Corp., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 00-4 (February 29, 2000).   |
| DOJ Eval.               | Evaluation of the United States Department of Justice, <u>Application by SBC Communications, Inc, et al. for Provision of In-Region, InterLATA Services in Texas</u> , CC Docket No. 00-4, February 14, 2000   |
| DOJ 3/20 Ex Parte Eval. | Letter from Donald J. Russell, Chief, Telecommunications Task Force, Antitrust Division, Department of Justice to Magalie Roman Salas, Secretary, Federal Communications Commission, (March 20, 2000).   |
| SBC Br.                 | Brief, <u>Application by SBC Communications, Inc, et al. for Provision of In-Region, InterLATA Services in Texas</u> , CC Docket No. 00-4, (January 10, 2000).   |
| SBC Reply Br.           | Reply Brief, <u>Application by SBC Communications, Inc, et al. for Provision of In-Region, InterLATA Services in Texas</u> , CC Docket No. 00-4, (February 22,2000).   |
| SBC Letter Br.          | Ex Parte Submission from James D. Ellis, et al to Magalie Roman Salas, Secretary, Federal Communications Commission, (April 5, 2000).  |
| SBC 4/21 Ex Parte       | Letter from Austin C. Schlick to Magalie Roman Salas, Secretary, Federal Communications Commission, (April 21, 2000).  |
| SWBT TPUC Br.           | Southwestern Bell Telephone Company's Brief on Phase I Issues, in <u>Complaint of AT&amp;T Communications of the Southwest, Inc., et al. Against Southwestern Bell Tel. Co. To Eliminate Non-Recurring Charges</u> , Docket Nos. 21622, 22290 (Texas PUC filed Apr. 5, 2000) |

**APPENDIX TO SUPPLEMENTAL COMMENTS OF AT&T CORP. IN  
OPPOSITION TO SBC's SECTION 271 APPLICATION FOR TEXAS**

**CC Docket No. 00-65**

| <b>EXH.</b> | <b>DECLARANT</b>                      | <b>SUBJECT(S) COVERED</b>                                | <b>RELEVANT<br/>STATUTORY<br/>PROVISIONS</b> |
|-------------|---------------------------------------|--|--|
| A           | Sarah DeYoung/Mark Van de Water       | UNE Loop Provisioning—Hot Cuts                           | § 271(c)(2)(B)(ii), (iv), (xi)               |
| B           | Julie S. Chambers/<br>Sarah DeYoung   | Operations Support Systems                               | § 271(c)(2)(B)(ii), (iv), (x)                |
| C           | C. Michael Pfau/<br>Julie S. Chambers | xDSL   | § 271(c)(2)(B)(ii), (iv);<br>§ 271(d)(3)(C)  |
| D           | A. Daniel Kelley/<br>Steven E. Turner | Public Interest—Scope and<br>Nature of Local Competition | § 271(d)(3)(C)                               |
| E           | C. Michael Pfau                       | Performance Measurements                                 | § 271(c)(2)(B)(i), (ii);<br>§ 271(d)(3)(C)   |

**MISCELLANEOUS APPENDIX**

| <b>EXH.</b> | <b>DOCUMENT</b>  |
|-------------|--|
| F           | SBC-ASI Agreement on Interim Line Sharing, available at <a href="http://www.sbc.com">www.sbc.com</a>   |
| G           | Southwestern Bell Telephone Company's Brief on Phase I Issues, in <u>Complaint of AT&amp;T Communications of the Southwest, Inc., et al. Against Southwestern Bell Tel. Co. To Eliminate Non-Recurring Charges</u> , Docket Nos. 21622, 22290 (Texas PUC filed Apr. 5, 2000) |

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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|---|---|-----------------|
| In the Matter of                            | ) |                 |
|   | ) |                 |
| Application of SBC Communications Inc.,     | ) |                 |
| Southwestern Bell Telephone Company,        | ) | CC Docket 00-65 |
| And Southwestern Bell Communications        | ) |                 |
| Services, Inc. d/b/a Southwestern Bell Long | ) |                 |
| Distance for Provision of In-Region         | ) |                 |
| InterLATA Services in Texas                 | ) |                 |

**SUPPLEMENTAL COMMENTS OF AT&T CORP. IN OPPOSITION TO  
SBC'S SECTION 271 APPLICATION FOR TEXAS**

AT&T Corp. ("AT&T") respectfully submits these comments on the second application of SBC Communications, Inc., et. al. ("SBC") for authority to provide interLATA services in Texas.

**SUMMARY AND INTRODUCTION**

SBC's first Texas application was defective on its face. SBC's xDSL provisioning, for example, was plainly discriminatory, and SBC had not even attempted to demonstrate compliance with "minimally acceptable" standards for provisioning hot cut loops that this Commission set forth in the BA-NY Order. Aware of these and other defects, and in defiance of this Commission's evidentiary rules, SBC inundated the Commission with daily ex parte submissions totaling thousands of pages, jettisoning, supplementing, and restating its data with shameless abandon. But all this attempted reshaping of the record could not camouflage the basic truth – SBC had not met the Commission's minimum standards for approval of a section 271 application.

SBC therefore withdrew its initial application on April 5, 2000. But it did not take steps to improve its performance to meet the Commission's standards or to conform its policy positions to the requirements of law. Instead, SBC, by means of a letter and supplemental affidavits ("SBC Letter Br."), simply "restart[ed] the 90-day clock" to put its latest spin on the same (or worse) facts. SBC Letter Br. 2. This follow-on 271 filing is a wholly inadequate and anticompetitive response to the prior demonstration of checklist noncompliance. None of the fundamental defects in SBC's initial application has been cured. Indeed, in several key respects, SBC's performance has gotten worse. Accordingly, this application can and should be rejected outright.

Indeed, SBC has already telegraphed its recognition of the inadequacy of its Application. Five days before – and again the night before – these comments were due, SBC filed two new ex parte analyses of its performance and 1,000 pages of new data.<sup>1</sup> These preemptive filings, together with SBC's absurd complaint about AT&T's temerity in responding to SBC's procedurally improper and substantively misleading ex parte submissions,<sup>2</sup> also signal SBC's resolve to continue treating the 271 application process as a regulatory war of attrition.

This Commission's steadfast rejections of BellSouth's repeated applications sent a vitally important message that is equally applicable here: a BOC's willingness to subject the Commission to repeated submissions of facially invalid applications is not a substitute for demonstrated nondiscriminatory performance. That same message must be sent again here. It is crucial to the future of local competition, not only in Texas but nationwide, that this Commission insist upon full checklist implementation before granting SBC's application.

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<sup>1</sup> See SBC 4/21 Ex Parte.

<sup>2</sup> See SBC Letter Br. 1 n.1.

SBC has not made and cannot yet make that showing in Texas. As SBC puts it: “Nothing speaks more eloquently than the facts.” (SBC Letter Br. 5). Unfortunately, when it comes to reciting the truly relevant facts, SBC has swallowed its words.

First, SBC has neglected to tell the Commission about its complete change of position on providing CLECs access to unbundled loops to offer both voice and data services. Contrary to what it told this Commission in its Reply Comments (SBC Reply Br. at 37 n.19) last February, SBC is now categorically refusing to permit CLECs to use the unbundled loops that they have purchased as part of the UNE-platform to provide customers with data as well as voice services. That refusal is patently unlawful, because the Act and the Commission’s unbundling rules unequivocally require that incumbent LECs make available all of the features, functions and capabilities of the network elements they are required to provide. SBC’s refusal is also flagrantly discriminatory, because it is intended to and will have the effect of ensuring that SBC is the only carrier able to mass-market the bundled offering of voice and data services that residential customers demand and expect.

Indeed, at the same time that it is stonewalling its competitors, SBC is accelerating its rapid roll-out of its own xDSL service offering, known as “Project Pronto.” The express intent of this project is to make SBC the only carrier able to offer customers – particularly residential customers – a bundled package of voice and data services. And SBC – by virtue of its discrimination – is now making this goal a reality, locking up thousands of customers daily while denying all competitors the ability to offer a competing package. There is no greater threat to the future of local residential competition – for both voice and data services – than SBC’s refusal to grant UNE-platform based competitors access to the full functionality of the unbundled loop. SBC’s application should be swiftly and explicitly rejected on this ground alone.

SBC is also blocking xDSL competition in another significant way: it is blatantly discriminating against CLECs seeking to engage in line sharing with SBC. As SBC admits, line sharing is an inherently superior method of providing residential and many business customers with data services, because it allows the data service to be added to the customer's existing voice line. SBC has promised to allow CLECs to line share with it no later than June 5, 2000, after which the denial of line sharing would violate the Line Sharing Order. But that promise does not excuse SBC's flagrantly discriminatory decision to let its own data affiliate, and only its own data affiliate, engage in line sharing today. SBC's only explanation – that the SBC/Ameritech Merger Order approved interim line sharing – is frivolous, because the discrimination is obvious and because the Merger Order itself states that its terms were not intended to establish compliance with section 271.

Furthermore, as DOJ has observed, SBC discriminates against CLECs that require SBC to provide them with a second loop. The Commission made plain in the BA-NY Order that it would examine second-loop provisioning carefully for evidence of nondiscriminatory performance, and SBC continues to impede entry here by providing data CLECs with defective loops and by failing to provide the loops on time. This continuing discrimination is important because, although this is the xDSL entry route of least competitive significance in the long-run, it is the only route that SBC has made available to competitors.

Second, SBC's hot cut provisioning has become even worse than it was before. Here, again, SBC cannot bring itself to speak forthrightly about how its performance compares with the Commission's "minimally acceptable" standards of performance for hot cut loop provisioning. BA-NY Order ¶ 309. Nevertheless, in proceedings before the TPUC, SBC and AT&T have now jointly attested to reconciled data which show that SBC caused outages on

16.7% of AT&T's hot cut orders during the December-through-February period on which SBC relies in its renewed application. That performance is far worse than the 8.2% outage rate documented in the reconciled data for August through October (which was a principal ground for DOJ's recommended denial in its initial Evaluation), and nowhere near the minimally acceptable standard of outages on "fewer than 5% of orders" set in the BA-NY Order.

Because a failure to meet "any one" of the three measures of hot cut performance would be grounds for "enforcement action" (BA-NY Order ¶ 309), and because, even "the possibility of service disruptions when customers switch their service" is competitively significant (id.), SBC's high rate of outages is independent and complete evidence that SBC has failed to fully implement the competitive checklist. But SBC's provisioning difficulties go beyond outages. SBC also fails to meet the Commission's minimum standards for on-time performance of hot cuts and for provision of non-defective loops as measured by the number of "trouble reports" within seven days of installation. It has thus failed to meet its burden of proof on each critical measure of hot cut performance.

Equally fundamentally, SBC's largely manual processes for collecting and reporting the data relevant to its hot cut performance remain rife with error. These process failures, combined with SBC's ill-defined performance measurements that exclude certain critical aspects of its performance, mean that the only way that CLECs and regulators can obtain accurate and complete data on SBC's hot cut performance is by engaging in the laborious process of manually reconciling the CLECs' data with SBC's, order by order, and month by month. Relegating CLECs to such a process is itself a denial of a meaningful opportunity to compete, because such reconciliation cannot be conducted for more than a relatively small volume of orders. Although SBC is currently proposing new performance measurements and data-gathering processes in

proceedings before the TPUC, SBC should be required to implement them and demonstrate that they work reliably before its application is approved.

Third, in briefs recently filed with the TPUC (though not filed or mentioned in this Application), SBC has now admitted that there is no evidentiary basis in any record for the glue charges on the UNE-platform that it imposed until March 1<sup>st</sup> of this year, that it has not refunded, and that it is still seeking the right retroactively to impose after further pricing proceedings in Texas. SBC has therefore completely removed any basis on which this Commission could base a finding that SBC has established cost-based rates in Texas for combinations of unbundled elements. Moreover, its continued “scorched earth” litigation of an issue that it lost in the Supreme Court over a year ago is a classic example of SBC’s abuse of legal process to raise the barriers to local entry.

Fourth, SBC’s performance measures confirm that it is denying all CLECs nondiscriminatory access to unbundled elements and to interconnection. SBC has consistently reported noncompliance for all CLECs on at least one of every five of the performance standards that the TPUC found most critical to customers and competition. As a result, the TPUC fined SBC more than \$400,000 for this discriminatory performance in both January and February, 2000. Once again, words fail SBC, which does not even acknowledge this dispositive evidence of its failure to fully implement the competitive checklist.

Fifth, SBC has concededly failed to implement all that it admits needs to be done to provide CLECs with non-discriminatory access to OSS. Its new application addresses some of the outstanding problems by promising to take steps to fix them. Despite these promises, it remains true today that SBC’s order-rejection rates are excessively high, the percent of reject notifications that are manually generated is unreasonably high, and that its pre-ordering and

ordering interfaces cannot be integrated to provide a level of functionality equivalent to what SBC enjoys. In addition, SBC continues to flout change management requirements, and SBC has not demonstrated that its systems can handle competitive volumes of orders.

Sixth, SBC continues to insist that it may procure or accept restrictions from its UNE vendors that purport to authorize the very discrimination that the Act forbids. In this regard, SBC's promise to comply in the future with this Commission's orders is legally insufficient to demonstrate checklist compliance. Because the law is clear that requiring CLECs to negotiate their own intellectual property licenses plainly violates section 251(c)(3) (see AT&T v. Bell Atlantic, 197 F.3d 663, 670-71 (4<sup>th</sup> Cir. 1999)), SBC must demonstrate compliance with its obligation to obtain licenses for CLECs before its 271 application is approved.

Finally, SBC's restrictions on the use of unbundled network elements and its implementation of certain conditions of the Merger Order violate the antidiscrimination requirements of sections 251 and 271 as a matter of law. SBC's refusal to allow competing LECs to use certain unbundled elements to provide exchange access services, and the restricted availability of discounts on loops depending on the facilities-based status of the requesting carrier and the type of service provided, each starkly violate the prohibition on discrimination in section 251(c)(3) of the Act. And under this Commission's applicable legal standard, SBC's separate data affiliate – Advanced Solutions, Inc. (“ASI”) – is so obviously the successor of SBC, that SBC is required, and has failed, to demonstrate full checklist compliance with respect to ASI as well.<sup>3</sup>

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<sup>3</sup> In addition to the issues discussed in these Supplemental Comments, and consistent with the Commission's Public Notice establishing this Docket, AT&T reaffirms all of the reasons its previously raised in CC Docket No. 00-4 for denying SBC's 271 application for Texas.

Not surprisingly, SBC's intransigence and poor performance has led to an anemic level of local competition far below that which is occurring in New York. Indeed, SBC can present its glowing description of vibrant local competition in Texas – competition allegedly more intense than that in New York<sup>4</sup> – only by misrepresenting the facts. For example, the little local competition that now exists in Texas is generally limited to businesses in urban areas and, even in those areas, is focused almost entirely on Internet Service Providers (“ISPs”). Indeed, nearly 90% of all local traffic handled by CLECs in Texas is for ISPs. Kelley/Turner Supp. Decl. ¶ 9. The share of facilities loops provided by competitors to residential customers remains a paltry 0.2%.<sup>5</sup> Even including UNE-based competition, CLEC residential share is only 2.8% in Dallas/Fort Worth and Houston, and only 1.0% in other areas.<sup>6</sup> Between November 1999 and February 2000, Texas CLECs added only 19,500 UNE Platform (“UNE-P”) lines per month – less than 20% of the rate at which New York CLECs added UNE-P lines at the same time.<sup>7</sup>

Moreover, SBC's principal claim (SBC Letter Br. 3) – that CLECs currently serve 1.7 million lines, 70% of which are served by facilities-based carriers – is untrue. As the DOJ has stated, SBC has “substantially over-estimated the number of lines served by facilities-based carriers, about which it has no direct evidence.” DOJ Eval. 8. Indeed, prior comments and new evidence demonstrate that SBC has more than double-counted the number of lines served by

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<sup>4</sup> See, e.g., Habeeb Supp. Aff. ¶ 3.

<sup>5</sup> Kelley/Turner Supp. Decl. ¶ 5 & Table 1.

<sup>6</sup> Kelley/Turner Supp. Decl. ¶ 17 & Table 4.

<sup>7</sup> Kelley/Turner Supp. Decl. ¶ 18. The UNE-P is the principal vehicle by which CLECs in Texas and New York are providing competitive residential services.

facilities-based competitors in Texas.<sup>8</sup> In its latest filing, SBC estimated that, as of February 1999, CLECs served 1,155,047 pure facilities-based lines.<sup>9</sup> By comparison, estimates of facilities-based entry based on CLEC data gathered by the TPUC reflect only 435,881 facilities-based lines.<sup>10</sup>

Faced with these dismal statistics concerning *existing* levels of local competition, SBC advances arguments about *future* competition, claiming that CLECs are beginning to mass-market local service.<sup>11</sup> In support of this claim, however, SBC offers only newspaper articles describing limited efforts to market certain types of local service to some customers in a few cities in Texas.<sup>12</sup> Such narrow efforts do not constitute mass marketing. If Texas local markets were truly open, CLECs would in fact be mass marketing local services across the state (as they are in New York),<sup>13</sup> not in limited fashion in just a few cities. In sum, only a tiny sliver of customers in Texas today has a realistic option of choosing a local carrier other than SBC.

And unfortunately, that is just the way SBC wants it. If customers throughout Texas are ever to have meaningful choices for their voice and data services, it will be because this Commission insisted that SBC fully comply with the market-opening duties of Section 271.

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<sup>8</sup> DOJ Eval. 8-9; Kelley/Turner Supp. Decl. ¶¶ 5, 7 & Table 1. SBC's estimation of facilities-based lines provided to residential customers is particularly overstated. Kelley/Turner Supp. Decl. ¶ 11.

<sup>9</sup> SBC's estimate was derived by multiplying the 420,017 interconnection trunks it reported in its service territory (Habeb Supp. Aff. Att. A) by a factor of 2.75 (2.75 x 420,017 = 1,155,047).

<sup>10</sup> Kelley/Turner Supp. Decl. ¶ 5 & Table 1.

<sup>11</sup> *E.g.*, Habeb Supp. Aff. ¶ 9.

<sup>12</sup> Kelley/Turner Supp. Decl. ¶ 21.

<sup>13</sup> Kelly/Turner Supp. Decl. ¶ 4.

**I. SBC DISCRIMINATES AGAINST CLECS IN THE PROVISION OF ADVANCED SERVICES**

No development in Texas is more threatening to the future of telecommunications competition than SBC's accelerated roll-out of its offer of advanced services coupled with SBC's refusal to provide competitors with nondiscriminatory access to SBC's network elements needed to compete with that offer. Through this stratagem, SBC is leveraging its longstanding monopoly over local phone service into the market for provision of bundles of local voice services, data services, and – once its 271 application is approved – long distance services. SBC's avowed goal is to be the 'only carrier' that can mass-market that particular and highly desirable package to customers.<sup>14</sup> And if this Commission does not quickly put a stop to SBC's discrimination, SBC will surely succeed.

The key to SBC's strategy is its unique control over the customer's local loop. That lets SBC provision advanced services to its embedded base of voice customers with a minimum of cost and disruption. As this Commission has found, and as SBC freely concedes in its supplemental application, the provision of advanced services over the same loop as the customer currently uses for voice service is far and away the most economical, efficient, and trouble-free approach.<sup>15</sup> To be able to compete fairly with SBC, competitors need the same access to SBC's essential loop facilities that SBC has.

But SBC is adamantly refusing to provide that access. As discussed further below, each of the three strategies that CLECs seek to use to compete with SBC to provide advanced services

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<sup>14</sup> See Pfau/Chambers Supp. Decl. ¶¶ 10, 56 (quoting SBC chairman Whitacre).

<sup>15</sup> See Line Sharing Order ¶¶ 32-56; Chapman/Dysart Supp. Aff. ¶¶ 8, 32, 36-37.

requires access to SBC's network elements, each is covered by sections 251 and 271, and each is being hindered, if not blocked altogether, by SBC's discriminatory conduct.

It is important to note at the outset, however, that the need for this Commission to put a stop to SBC's xDSL discrimination has grown only more urgent in the months since SBC filed its first Texas application. Project Pronto, which is SBC's avowed plan to become the "only" carrier able to offer residential customers "all the pieces" – voice and data – that they want,<sup>16</sup> is now galloping forward "ahead of schedule" and is on target to have 1 million DSL subscribers by year-end and the ability to offer service to 77 million customers by year-end 2002.<sup>17</sup> While SBC is concealing the exact number of subscribers it has signed up, it has made no secret of its success to date. As SBC's Chairman and Chief Executive Officer Edward Whitacre put it last month, "whatever number you think it is, it's a lot more than that."<sup>18</sup> Meanwhile, SBC reportedly has 9,000 representatives devoted to taking orders for DSL services – a work force that, if it focused on Texas for even one day, could far outstrip the 5,000 xDSL capable loops that it has taken all CLECs combined two years to achieve.<sup>19</sup>

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<sup>16</sup> See Pfau/Chambers Supp. Decl. ¶ 10, quoting SBC Pronto Press Release (Oct. 18, 1999).

<sup>17</sup> See Pfau/Chambers Supp. Decl. ¶ 57, quoting James D. Gallemore, EVP of strategic marketing, "SBC Cuts Price of xDSL Service," SBC News Release, San Antonio, Texas (Feb. 14, 2000).

<sup>18</sup> See Pfau/Chambers Supp. Decl. ¶ 56, citing RBOC Chiefs Stress Data Growth Potential, Communications Daily, March 10, 2000.

<sup>19</sup> See Pfau/Chambers Supp. Decl. ¶ 58, quoting Credit Suisse Analysts' Report; see SBC's Letter Br. 11 ("SBC has provisioned approximately 5,000 local loops for xDSL providers in Texas since August 1999").

To be sure, a rapid roll-out of advanced services to residential customers is a goal that everyone – including AT&T, other CLECs, the Commission and Congress – shares.<sup>20</sup> But more than one company needs to be able to participate. Indeed, the Commission made that very point when it barred both Ameritech and US WEST from becoming the only companies capable, in their respective regions, of offering customers the benefits of one-stop shopping for bundles of local and long-distance service.<sup>21</sup> As both the Commission and the Court of Appeals recognized, to grant a BOC the ability to create a unique bundled offer for which it is the “only source”<sup>22</sup> before that BOC had made all of its network elements fully and fairly available to competitors, would conflict fundamentally with the market-opening “incentive” that Congress intended section 271 to provide.<sup>23</sup> It is therefore critical to any evaluation of SBC’s 271 application that this Commission consider all of the ways that SBC is discriminating against CLECs that need access to SBC’s loop facilities to compete with SBC’s bundled offer.

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<sup>20</sup> Indeed, AT&T has invested billions of dollars to acquire and upgrade cable facilities to support two-way communications of voice and data for residential consumers. But as the Commission well knows, this is not only an expensive but a long-term process that – even when fully realized years from now – will still not enable AT&T to reach even 30 percent of U.S. households. The ability to use UNE-P to offer residential customers a package of voice and data services is thus crucial to AT&T’s ability to compete with SBC on a mass-market scale. See Tonge/Rutan Decl. ¶ 17.

<sup>21</sup> See Qwest Order, aff’d sub nom. U S WEST Comm., Inc. v. FCC, 177 F.3d 1057 (D.C. Cir. 1999) (“Qwest Appeal Order”), cert. denied, 120 S.Ct. 1240 (2000).

<sup>22</sup> Qwest Order ¶ 40; Brief for Respondents, filed in Qwest Appeal Order at 56-67.

<sup>23</sup> Qwest Appeal Order, 177 F.3d at 1060; see also Pfau/Chambers Supp. Decl. ¶¶ [52-54].

**A. SBC Discriminates Against UNE-P CLECs And Denies Them Full Use Of The Unbundled Loop**

AT&T's position is simple. When AT&T purchases the UNE-platform from SBC to serve an existing SBC residential customer, AT&T purchases, among other network elements, that customer's loop (and pays the full TELRIC-based rate). AT&T is therefore entitled to receive access to the full features, functions, and capabilities of that unbundled loop, so that AT&T can compete with SBC and provide the customer with data, as well as with voice, services.

Both the Act and this Commission's unbundling rules require incumbent LECs to provide this access to requesting CLECs. The Act itself defines the term "network element" to include the "features, functions, and capabilities that are provided by means of such [network element]." 47 U.S.C. § 153(29). The Act also requires incumbent LECs to provide "nondiscriminatory access" to their network elements so that CLECs can provide the "telecommunications service" they seek to offer. *Id.* § 251(c)(3); *see* § 251(d)(2); § 271(c)(2)(b)(ii), (iv). Synthesizing these statutory requirements, this Commission's unbundling Rule 307(c) states that:

An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element's features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element. 47 C.F.R. § 51.307(c) (emphasis added).

Beginning with the Local Competition Order, moreover, this Commission has repeatedly held that this duty to permit CLECs access to the full capabilities of network elements to provide the services they wish applies directly to CLECs seeking to use unbundled loops to provide advanced services. Thus, in the Local Competition Order, the Commission ruled that incumbent LECs must "take affirmative steps to condition existing loop facilities to enable requesting

carriers to provide services not currently provided over [the loop] . . . such as ADSL.” Local Competition Order ¶ 382. Similarly, in the BA-NY Order, the Commission held that:

Bell Atlantic must also provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested.

BA-NY Order ¶ 271. And in the UNE Remand Order, the Commission defined the loop element to include:

all features, functions, and capabilities of the transmission facilities, including dark fiber and attached electronics (except those used for the provision of advanced services, such as DSLAMs) owned by the incumbent LEC, between an incumbent LEC’s central office and the loop demarcation point at the customer premises.

UNE Remand Order ¶ 167.

Moreover, and as discussed further below, the Act’s nondiscrimination obligations provide an independent and equally compelling basis for requiring SBC to provide CLECs the ability to provide both voice and data services over existing loops. That, after all, is how SBC is marketing its own voice and data services. SBC therefore has an independent duty, under the non-discrimination obligation of section 251(c)(3), to provide UNE-P CLECs with comparable access.

SBC’s latest application has been submitted in defiance of its explicit legal obligation to provide CLECs nondiscriminatory access to the full functionality of the loop. That application confirms – though without any acknowledgment by SBC – that it has now reversed course and abandoned its prior written promise to comply with the law on this point. Specifically, SBC responded to AT&T’s concern by proclaiming to this Commission that “*AT&T is free to offer both voice and data service over the UNE Platform* or other UNE arrangements, whether by itself or in conjunction with its xDSL partner, I[P] Communications.” SBC Reply Br. at 37 n.19.

SBC also reinforced the point by asserting that “[i]f CLECs chose to offer voice services, they could share the voice line *in precisely the same way as SBC.*” *Id.* at 25 n.11 (emphasis added). SBC thus appeared – in one unequivocal stroke – to take this legal issue off the table in its first application.

If there were ever any truth to SBC’s prior statement of position – and as the Pfau/Chambers Supplemental Declaration sets forth in detail, ¶¶ 20-28, it is difficult to believe there ever was – there is certainly none now. Within days of the submission of its Reply Comments, and in response to AT&T’s requests for information as to how SBC planned to make its new pledge an operational reality, SBC’s representatives were flatly denying that SBC had any such policy and have since consistently refused even to discuss ways in which AT&T or other CLECs could offer data services over loops obtained as part of the UNE-platform. Pfau/Chambers Supp. Decl. ¶¶ 22-28.

To the best of AT&T’s knowledge, SBC has never expressly informed this Commission that it has withdrawn its concession in its Reply Comments.<sup>24</sup> But its new application makes its true position quite clear. SBC’s proposed amendments to the T2A to state that the High Frequency Portion of the Loop (“HFPL”), which is the portion needed to offer data services, “is not available in conjunction with a combination of network elements known as the platform or UNE-P (including loop and switch port combinations) or unbundled local switching or any arrangement where SBC is not the retail POTS provider.”<sup>25</sup> SBC’s complete reversal of position

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<sup>24</sup> Given SBC’s practice of filing at least one and often multiple ex parte letters with this Commission each day and only erratically serving them on interested parties and/or posting them on its website, it is difficult for any third party to be sure that it is aware of everything that SBC has attempted to put into the record of this proceeding.

<sup>25</sup> T2A section 4.7.4, submitted as Attachment C to the Supplemental Declaration of Michael Auinbauh.

from its Reply Comments – and its unequivocal intent to deny UNE-P CLECs access to the full functionality of the unbundled loop – thus could not be more clear.

It is equally clear that the terms and conditions on which SBC is willing to let CLECs use its loops to provide both voice and data service are blatantly discriminatory. SBC's new position is that CLECs may offer voice and data only over a second loop, not over the customer's existing loop (which is provisioned in a UNE-P arrangement). The absurdity of this proposal is evident even on the face of SBC's new application. In the Chapman/Dysart Supplemental Affidavit, SBC's own witnesses take pains to explain that the discriminatory delays and equipment problems that SBC is currently imposing on data CLECs are attributable to the fact that data CLECs "must order a new, unbundled loop" from SBC, whereas SBC (and its affiliate, ASI) enjoy the luxury of providing data service "over an existing loop, i.e., the same loop used to provide voice grade services to the xDSL customer." Chapman/Dysart Supp. Aff. ¶ 32. This difference matters, because as Chapman/Dysart explain, "when ADSL is provisioned over a working loop, the continuity and use of the loop are already established" (id. ¶ 38), which is inherently not the case with a "new, unbundled loop." Id. ¶ 32; see id. ¶¶ 8, 35, 36; see also Pfau/Chambers Supp. Decl. ¶¶ 33-34. SBC's witnesses thus confirm that to relegate UNE-P CLECs to a second loop is to guarantee them a lower standard of performance than either SBC, SBC's data affiliate, or data CLECs who obtain line sharing, will enjoy. See id. ¶¶ 29-36.

Moreover, the discrimination will not be limited simply to delayed provisioning and non-working loops. Use of second loops will cost UNE-P CLECs more, because of numerous additional service orders, provisioning work, and charges that SBC's proposal would impose. Id. ¶¶ 30, 37. And all of this expense, complication, and delay comes before the final coup-de-grace. In order to disconnect the customer's inside wire from the existing line and reattach it to

the “new” line, SBC’s proposal would require that a technician perform work at the premises of each new residential customer. Id. ¶ 31. In short, the costs and burdens of SBC’s proposed alternative would prohibit its use on any significant scale. Indeed, this is simply a sequel, in the context of xDSL, to SBC’s protracted and unsuccessful attempt to overturn this Commission’s Rule 315(b) and thereby deny competitors the right to obtain combinations of network elements that SBC had not previously ripped apart. Were SBC to succeed this time, it would become the only carrier in its region capable of mass-marketing bundles of voice and data services to residential customers.

SBC’s discrimination against UNE-P CLECs does not stop here. SBC is not content simply to block AT&T from offering its own voice/data package to residential customers. SBC also prevents AT&T from providing *voice service alone* through the UNE-platform to customers who are receiving SBC’s xDSL service. As AT&T discussed in its opening comments (at 12-13), if AT&T wins a voice customer from SBC who has subscribed to SBC’s xDSL service, SBC will force that customer to give up SBC’s xDSL service unless the customer switches voice service back to SBC. Since SBC has already ensured that AT&T cannot respond with a competing offer of data service, SBC has effectively quarantined all of its xDSL customers from voice competition from AT&T.

This practice is as unlawful as it is anticompetitive. See AT&T Comments at 18-21. And its competitive impact is severe. SBC is exploiting its monopoly control over essential xDSL-related inputs to block competition not just for bundled voice/data packages, but for local voice services alone. As this Commission recently confirmed in the UNE Remand Order (see id. ¶¶ 253, 273, 296) carriers have no practical alternative today to the UNE-platform if they wish to mass-market local voice service to residential customers. By rapidly signing up thousands of

residential customers for xDSL service each week throughout its region, then refusing to let those customers switch their voice service to AT&T, SBC is leveraging its local monopoly to destroy local voice competition as well.

There is no technical justification for SBC's intransigence. As the Pfau/Chambers Supplemental Declaration explains (§§ 43-47), SBC can enable a UNE-P carrier to provide voice and data over the customer's existing loop by using virtually the same procedures that it will use to provide line-sharing to other carriers. There is also no legal justification. Indeed, the only legal argument that SBC has ever intimated that it would raise in this context is an obvious non-sequitur.

SBC's legal position apparently rests solely on one sentence of the Line-Sharing Order, which states that "incumbent carriers are not required to provide *line sharing* to requesting carriers that are purchasing . . . the platform." Line Sharing Order ¶ 72 (emphasis added). The short answer to this argument is that AT&T is not requesting "line sharing" at all.<sup>26</sup> Indeed, far from wanting to "share" the line with SBC, AT&T wants the whole line to itself, voiceband and high frequency, so that it can offer a bundled package of voice and data to compete head-to-head with SBC. In asking for this access, AT&T is thus demanding only what the Act and this

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<sup>26</sup> Line sharing involves having the incumbent provide the voice service, while the CLEC provides the data services, on the same loop. See, e.g., Line Sharing Order ¶ 4 (line sharing requirement provides access to "the high frequency portion of the local loop" so that the competitive LECs can "compete with incumbent LECs to provide to consumers xDSL-based services through telephone lines that the competitive LECs can share with incumbent LECs"); id. ¶ 13 (line sharing requirement "permit[s] competitive LECs to provide xDSL-based services by sharing lines with the incumbent's voiceband services").

Plainly, AT&T is not seeking line sharing. It does not want SBC to provide the "voiceband service" on the line, and it does not want just the "high frequency portion of the loop" in order to compete just for data services. In contrast to line sharing, AT&T wants access to all of the loop so that AT&T can arrange for the provision of both voice and data services, which leaves nothing of the loop to "share" with SBC at all.

Commission's rules have long required – that SBC make available to AT&T the full functionality of the loop so that AT&T can provide the “services it seeks to offer” (§ 251(d)(2)(B)) – both voice and the data services – over that line.

**B. SBC Discriminates In The Provision Of Line Sharing**

The second CLEC strategy for offering xDSL services to consumers involves line sharing. See note 26, supra. Here, too, SBC is starkly discriminating against its competitors. Today, SBC is providing its own data affiliate, ASI, with “interim line sharing.” SBC Letter Br. 15. SBC thus allows ASI to provision data services to SBC's embedded base of millions of local voice customers over the same working phone lines those customers now use.

By contrast, SBC denies unaffiliated CLECs any access whatsoever to line sharing. SBC admits that it will not provide unaffiliated CLECs with line sharing until “May 29, 2000” at the earliest. Cruz Supp. Aff. ¶ 17. At least until then, CLECs that wish to compete with SBC's affiliate must make do with ordering a second line which, as discussed above, SBC concedes cannot be provided at a level of quality equal to that of line sharing.

Thus, SBC's affiliate now enjoys access to SBC's unbundled loops that is different – and of higher quality – than what SBC affords competitors. Under the plain terms of sections 251(c)(3), this is discrimination, pure and simple.

None of SBC's purported justifications has merit. First, SBC claims that it need not provide line sharing to unaffiliated CLECs today because the Line Sharing Order does not require line sharing until June 5, 2000. See SBC Letter Br. 16. This argument fails, however, for the obvious reason that, in this proceeding, SBC's obligation is to demonstrate compliance not simply with the terms of the Line Sharing Order, but with the nondiscrimination and other requirements of section 271. Furthermore, nothing in the Line Sharing Order either (1) prohibits incumbent LECs from complying with their line sharing obligations prior to June 5, 2000, or

more importantly (2) excuses incumbent LECs from their duty under sections 251 and 271 to provide CLECs with nondiscriminatory access to unbundled network elements.

In short, SBC is obligated by law to comply with the Line Sharing Order *and* sections 251(c)(3) and 271. It could do so in at least two ways. It could make “interim line sharing” available both to its own affiliate and to unaffiliated CLECs on equal terms and conditions. Or it could deny line sharing both to its affiliate and to unaffiliated carriers (assuming it had legitimate operational grounds to do so) until the effective date of the Line Sharing Order. But what it may not lawfully do is provide line sharing to its affiliate while simultaneously denying line sharing to competitors.

SBC’s second argument is equally flawed. SBC claims that its discriminatory provision of line sharing to ASI is “permitted by the SBC/Ameritech merger conditions.” SBC Letter Br. 15. But the merger conditions, by their terms, provide SBC no support in a section 271 application. The Commission made it plain that the merger conditions were “designed to address potential public interest harms *specific to the merger*.” SBC/Ameritech Merger Order ¶ 357 (emphasis added); *id.* ¶¶ 356-61. They were expressly not intended to have “precedential effect in any forum” (*id.* App. C, n.2), and in particular were not “designed to address . . . the criteria for BOC entry into the interLATA services market.” *Id.* ¶ 357. The mere approval of interim line sharing in the merger conditions, therefore, does not obviate the need for SBC to demonstrate, on an independent basis, that its selective provision of interim line sharing only to its affiliate does not violate section 271.

Finally, SBC observes that, during the period of interim line sharing, competing providers will receive “a 50 percent discount on the use of a second loop to provide advanced services.” SBC Letter Br. 15, quoting SBC/Ameritech Merger Order ¶ 476. But here again, the

mere fact that a “discount” on loop prices was perceived, at the time of the merger, to provide a sufficient basis for approval of the merger does not obviate the need for an independent assessment under section 271 on the basis of the record here. And the record here makes clear that this so-called “50 percent discount” on the price of a second loop is – from the standpoint of section 271 – no discount at all, and does not begin to render the denial of interim line-sharing non-discriminatory.

From the standpoint of section 271, a CLEC may be said to receive a “discount” on the price of a second loop only if the CLEC is paying less for its second loops than what ASI is paying for its (shared) loops. SBC’s posted line-sharing contract with ASI purports to show that ASI is paying the same price that SBC has proposed to charge CLECs in the future for line sharing – 50% off the unbundled loop price – which is the same as the so-called “discounted price” that CLECs are being forced to pay today for a second loop. See Auinbauh Supp. Aff. ¶ 6; SBC-ASI Agreement on Interim Line Sharing (appended hereto as Exhibit F). From the perspective of section 271, then, CLECs, as compared to ASI, are receiving no “discount” at all. Instead, they are paying the same price today for an inferior second loop that ASI pays for “an existing, already-tested and trouble-free loop for [its] DSL services.” Chapman/Dysart Supp. Aff. ¶ 8. To make CLECs pay the same price as ASI for a loop that is inferior to what ASI receives is discriminatory.

### **C. SBC Discriminates In The Provisioning Of Second Loops**

The provisioning of second loops for data service is of competitive significance chiefly because SBC has shut down the other two more promising modes of xDSL entry. DOJ’s evaluation summarized the reasons why SBC’s first application for Texas fell far short of demonstrating nondiscriminatory performance, and SBC’s latest submission confirms that this remains the case.

Specifically, SBC concedes that its performance reports show that it is not providing “parity” of access in 2 “of the 5 categories” of xDSL performance “from September 1999 through February 2000.” Chapman/Dysart Supp. Aff. ¶ 21. First, SBC concedes that, with respect to four of the measures of on-time installation performance, “the performance results indicate that SBC was out of parity.” *Id.* ¶ 35. Indeed, SBC chronically fails to meet CLECs’ due dates at a rate comparable to the on-time performance it provides itself. SBC also concedes that its performance reports demonstrate that, for three of the past six months (through February, 2000), SBC “fail[ed] to provide parity performance” insofar as the quality of second loops is concerned. *Id.* ¶ 41. In each of these three months, SBC confirms that CLECs reported troubles within 30 days of the installation of the new loop at a far higher rate than the benchmark permits. *Id.* Proof of nondiscriminatory performance in both of these areas was specifically deemed important by this Commission in the BA-NY Order (¶ 335), and in both areas SBC still falls short.

None of SBC’s excuses for its poor performance on second loops has any merit. For example, SBC claims that the high rate of trouble reports on second loops “is directly attributable to the fact that many CLECs have elected to utilize non-standard xDSL technologies.” Chapman/Dysart Supp. Aff. ¶ 41. SBC provides no evidence to support this speculative assumption. And such speculation is implausible on its face, because it requires the factfinder to believe (absurdly) that CLECs “elected to utilize non-standard xDSL technologies” only in the three months when SBC failed to meet its performance standard, and not in the three months when SBC did achieve the standard. Absent actual proof of CLEC-caused error – which this Commission has previously and expressly required when a BOC applicant has tried to blame the

CLECs for its provisioning problems<sup>27</sup> – the only reasonable conclusion is that SBC simply has not yet devoted the resources necessary to provide CLECs with nondiscriminatory second-loop provisioning on a consistent basis.<sup>28</sup> See Pfau/Chambers Supp. Decl. ¶¶ 71-77.

**D. SBC Is Using Project Pronto's Architecture To Limit CLEC Access**

A new threat to competitive entry is emerging in SBC's intent to foreclose access to the Project Pronto Architecture for carriers that wish to provide integrated voice and data service offerings. See Pfau/Chambers Supp. Decl. ¶¶ 60-69. SBC has designed Project Pronto to expand the use of fiber optic loop feeder to widely deployed remote terminals; this will shorten the lengths of the copper loop plant that services customers' homes, thereby increasing the total number of customers who will be able to obtain xDSL services and improving the quality and value of the services they can obtain. Id. ¶ 62. Although the architecture itself is beneficial for consumers, SBC's intended use of it to exclude competitors is not.

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<sup>27</sup> See Second Bell South Louisiana Order ¶ 111 (BellSouth may not shift blame for poor flowthrough to CLEC-caused errors absent empirical proof). Moreover, apart from its failure to prove its assertions that CLECs were the cause of its poor performance, SBC makes no attempt to show that performance measures are satisfied once the "CLEC-caused" errors are eliminated from consideration.

<sup>28</sup> The same is true with respect to SBC's twin explanations for its failure to provision second loops on-time. First, SBC admits that it lacks the data today to prove what its performance would be once the "systematic skewing" of results caused by the denial of line sharing to CLECs is accounted for. Chapman/Dysart Supp. Aff. ¶ 36. While SBC explains the steps it is taking to develop and implement new performance measures to capture its performance apart from the denial of line sharing (id.), the fact that such data will be available only in the future lends no support to SBC's attempt to demonstrate that, as of April 5, 2000, it had fully implemented its checklist obligations. SBC's other purported "explanation" of missed due dates (see id. ¶ 40) is in reality simply an admission that it has not deployed a work force sufficient to allow it to meet the due dates that "as a result of the Covad/Rhythms Arbitration Award" (id.), it is required by law to meet. Inadequate "work force availability" (id.) to meet the due dates promised to CLECs is not a justification for poor performance but rather a confirmation of it.

Specifically, SBC has stated its intent to deny CLECs wishing to provide integrated voice and data service the ability to access its network at the remote terminal. Id. ¶¶ 62-64. In addition, SBC has also acknowledged that collocation space at its remote terminals is scarce, and that spare copper facilities, should they exist, may not permit a competing carrier to offer xDSL services of the same speed or quality that SBC's remote-terminal architecture will permit. Id. ¶¶ 68-69. Yet SBC has provided no useful information as to how it intends to implement its obligation, under the UNE Remand Order, to provide unbundled equipped loops to requesting CLECs who cannot collocate at remote terminals and cannot use spare copper facilities to provide the services they seek to offer. Id. ¶ 69.<sup>29</sup> Indeed, the little information SBC offers suggests that it may be intending to charge unlawfully high rates for the portion of the loop plant that connects the remote terminal to the central office, and to impose improper use restrictions on CLECs seeking access to this portion of SBC's network. Id.

#### **E. SBC's Data Affiliate Does Not Cure SBC's Discrimination**

Finally, SBC's "establishment of a separate advanced services subsidiary" (SBC Letter Br. 11) is no substitute for proof of nondiscrimination with respect to any of its xDSL-related legal obligations. SBC appears to treat the issue as solely one of whether its allegedly "separate" affiliate, ASI, is "fully operational." Id. at 15. That focus entirely misses the fundamental point.

The mere existence of a data subsidiary, even a truly separate and fully operational one, says nothing about the ultimate legal question, which is whether SBC is providing more

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<sup>29</sup> As was the case with the Line Sharing Order, the fact that SBC filed its application prior to the effective date of the UNE Remand Order does not eliminate SBC's obligation to comply with its separate nondiscrimination obligations now in order to demonstrate full implementation of its checklist duties under section 271. Here, SBC has not even attempted to show how it will come into compliance with this crucial obligation, let alone demonstrated that it is not discriminating today against competitors who need equipped loops to get nondiscriminatory access to SBC's network.

favorable treatment to its affiliate than it is to unaffiliated competitors. As this Commission has previously recognized, the existence of a separate affiliate makes it easier to detect such discrimination.<sup>30</sup> But the incentive of the BOC applicant to discriminate remains unaltered, and so, therefore, does its burden to demonstrate that its affiliate is being treated no differently than any other competitor. See DOJ Eval. 25-27.

Here, SBC has not and cannot make that showing. First, as noted above, SBC concededly is now providing its affiliate with exclusive access to line sharing that other CLECs desire but are not yet permitted to have. Second, SBC has consistently discriminated for months in favor of its affiliate in a host of other ways, including access to scarce collocation space, to the engineering and operations, installation, and maintenance expertise of SBC, and to exclusive “customer care” arrangements that go beyond the joint marketing permitted by the merger conditions. See Pfau/Chambers Supp. Decl. ¶¶ 83-89.<sup>31</sup> Third, because SBC’s affiliate became “operational” only on April 5, 2000, the same date SBC filed its second Texas application, SBC concededly has no data yet to present to this Commission concerning how the “280 xDSL-capable loops per month” (SBC Letter Br. 16) that SBC promises ASI will now order from SBC are being provisioned as compared to the second loops that unaffiliated CLECs are currently ordering. For these reasons alone, it is clear that the alleged transformation of ASI into an “operational” affiliate does not itself permit approval of SBC’s application.

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<sup>30</sup> Second Computer Inquiry, 77 F.C.C.2d 384, 461-62, ¶¶ 201-05; see id. ¶¶ 204-05 (separate subsidiary “does not significantly change the incentives of a firm upon which it is imposed,” but “reduces the ability of dominant firms to engage in predation or to do so without detection”) (emphasis added).

<sup>31</sup> Indeed, as AT&T explains elsewhere, SBC and ASI remain so significantly interdependent that, from a competitive perspective, they operate as a single entity. See infra Part VII.C; AT&T Comments at 25-27; Pfau/Chambers Supp. Decl. ¶¶ 83, 89.

There is an even more fundamental point, however, about the limits of SBC's affiliate that this Commission should not overlook. Even if SBC were to treat its data affiliate exactly as it treated all unaffiliated competitors, that alone would not suffice to show that SBC was not discriminating against a competitor, such as AT&T, that seeks to compete not only with the affiliate but with SBC itself. That is precisely the case with respect to voice/data competition over UNE-P. It may be that ASI, like AT&T, cannot order the UNE-platform from SBC and obtain the full functionality of the unbundled loop. But of course, from ASI's perspective, that does not matter, because ASI and SBC jointly accomplish the same thing by presenting themselves to the public as one company and jointly marketing voice and data services over the customer's existing loop.<sup>32</sup> The mere creation of an operational subsidiary, therefore, in no way excuses SBC's discriminatory failure to provide its competitors with access to the full functionality and capability of SBC's loops.

## **II. SBC IS STILL NOT PROVIDING NONDISCRIMINATORY ACCESS TO HOT CUT LOOPS**

SBC's first application failed to demonstrate that SBC has "fully implemented" its duty to provide CLECs with "nondiscriminatory access" to unbundled voice-grade loops. 47 U.S.C. §§ 271(c)(2)(B)(ii), (iv), (d)(3)(A)(i). Indeed, in its opening application, which was required to be "complete when filed" (*see* BA-NY Order ¶ 34), SBC failed even to attempt to show that its performance met the three performance criteria (for outages, on-time performance, and troubles) that this Commission held were each critical to a "minimally acceptable" demonstration of checklist compliance with respect to hot-cut loops. *Id.* ¶ 309. As AT&T demonstrated and DOJ confirmed, however, SBC caused outages "on 8.2% of AT&T's CHC orders, an outage rate

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<sup>32</sup> See Part VII.C, *infra*.